

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL., PETITIONERS

v.

SILAS MASON Co.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States respectfully requests that the Court grant the petition for certiorari in the above case.

This case involves the liability of Government cost-plus contractors under the Fair Labor Standards Act. During the war the Government built a large number of war plants which it continued to own, but which were operated by independent contractors like the respondent herein. Pursuant to instructions from the War Department, the contractors paid the vast majority of their employees time and one-half for all hours worked over forty per week. We are advised by the Department of the Army that this was done

as a matter of labor policy, without regard for whether the Fair Labor Standards Act was applicable. Since the termination of the war, a great many of the employees who were not paid time and one-half for hours over forty have brought suits such as this case for violations of Section 7 of the Act. The plaintiffs in these suits are, in the main, employees as to whom there is doubt as to the applicability of the Fair Labor Standards Act, such as persons whose work may be regarded as in a professional or executive capacity, and thereby exempt under Section 13 (a) (1), and firemen as to whom there has been a dispute as to what hours are to be counted as hours worked (e. g., *Bell v. Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813).

Approximately 250 suits have been brought against Government cost-plus-contractors by such employees. The aggregate of the sums which may eventually be involved in these claims, according to information received from the Department of the Army, runs to several hundred millions of dollars. If the decision below in the instant case is correct, all of these suits will fail. If the decision is incorrect, the defendants will present other defenses which will have to be determined by the courts in a large number of long trials involving the status of thousands of individual employees.

In a number of these cases private counsel for the contractors have raised the questions of general coverage determined by the court below. The Department of the Army is of the view that these defenses have merit, but the Wage and Hour Administrator of the Department of Labor has filed briefs as *amicus curiae* in the lower courts in many of the cases in which he takes a contrary position on the question of coverage.

In a number of cases the National Labor Relations Board has also taken the position, contrary to that of the court below, that interstate commerce includes the interstate transportation of property of the United States to be used for military purposes.¹ One of its decisions on the ques-

¹ *Westinghouse Electric & Mfg. Co.*, 38 N. L. R. B. 404, 412; *Day & Zimmerman, Inc.*, 39 N. L. R. B. 1313, 1314, and 41 N. L. R. B. 24, 25; *American Hawaiian S. S. Co.*, 41 N. L. R. B. 425; *United States Cartridge Co.*, 42 N. L. R. B. 191, 192; *Lukas-Harold Corp.*, 44 N. L. R. B. 730, 731-732; *Copolymer Corp.*, 52 N. L. R. B. 578, 579; *Brown Shipbuilding Co.*, 57 N. L. R. B. 326, 328; *War Hemp Industries, Inc.*, 57 N. L. R. B. 1700, 1710; *Brown Shipbuilding Co.*, 58 N. L. R. B. 998, 999-1000; *Brown Shipbuilding Co., Inc.*, 60 N. L. R. B. 196; *Atlas Fence Co.*, 61 N. L. R. B. 984, 985; *Carl L. Norden, Inc.*, 62 N. L. R. B. 828, 836-837; *Lone Star Defense Corp.*, 63 N. L. R. B. 579, 580; *Odenbach Shipbuilding Corp.*, 64 N. L. R. B. 1026, 1034; 47 N. L. R. B. 1261, 1262; *The B. F. Goodrich Co.*, 65 N. L. R. B. 1229, 1232; *Brown Shipbuilding Co.*, 66 N. L. R. B. 1047, 1054-1055; *The Ingalls Shipbuilding Corp.*, 67 N. L. R. B. 1194, 1195-1196; *Waterfront Employers Ass'n of the Pacific Coast*, 71 N. L. R. B. 80, 87; *Carbide and Carbon Chemical Corp.*, 73 N. L. R. B. 134, 135; *Reynolds Corp.*, 74 N. L. R. B. No. 248.

tion is now awaiting review in the Fifth Circuit.² This issue is one of constitutional interpretation as well as of statutory construction, and its importance transcends the Fair Labor Standards Act.

All of the governmental agencies concerned are agreed that the questions presented in this case should be settled finally by this Court, and that an early disposition of the matter is highly desirable.

There is in addition a conflict in the lower courts upon the question of whether the Fair Labor Standards Act applies to the employees in Government-owned munitions plants operated by cost-plus contractors. The Circuit Court of Appeals for the Seventh Circuit (*Bell v. Porter, supra*) and the Supreme Court of Iowa (*Umthun v. Day & Zimmerman, Inc.*, 235 Iowa 293) have reached a conclusion different from that of the court below. Cf. *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. C. A. 2). Most District Court decisions are to the same effect, but there are a number of decisions to the contrary.³

² *Labor Board v. Reynolds Corporation*, No. 11492 (C. C. A. 5).

³ Employees of contractors covered: *Bailey v. Porter*, 6 W. H. Cases 1017 (N. D. Ill., 1947); *O'Riordan v. Helmets, Inc.*, 6 W. H. Cases 961 (N. Y. C. Ct., 1947); *Ware v. Good-year Corp.*, 6 W. H. Cases 160 (S. D. Ind., 1946); *Sweetman v. Remington Rand*, 6 W. H. Cases 336 (S. D. Ill., 1946); *Moehl v. du Pont de Nemours & Co.*, 6 W. H. Cases 638 (N. D. Ill., 1947); *Blazier v. Western Pipe & Steel Co.*, 6 W. H. Cases 636 (S. D. Cal., 1946); *Tiller v. Anchor Optical*

In view of the importance of the questions and the conflict, it seems sufficient at this time to state that on the merits of the case there is grave doubt as to the correctness of the decision below with respect to each of the issues decided.

For the above reasons we urge that the petition for certiorari be granted. In view of the

Corp., 6 W. H. Cases 655 (S. D. N. Y., 1947); *Roland v. United Airlines*, 6 W. H. Cases 663 (N. D. Ill., 1947); *Bolanger v. Hopeman Bros.*, 6 W. H. Cases 616 (D. Maine, 1947); *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa); *Lasater v. Hercules Powder Co.*, 7 W. H. Cases 150 (E. D. 10, 1947); *McCumisky v. Norden, Inc.*, 7 W. H. Cases 142 (N. Y. S. Ct. 1947); *Sigkins v. Elmhurst Contracting Co.*, 181 Misc. 791, affirmed, 181 Misc. 793, affirmed, 268 App. Div. 858; *Steiner v. Pleasantville Constructors*, 181 Misc. 798, affirmed (modified on other grounds), 182 Misc. 66, affirmed 269 App. Div. 738; *Henderson v. Bechtel-McCormick Corp.*, 7 W. H. Cases 107 (N. D. Ala., 1947); *Jackson v. Northwest Airlines*, 7 W. H. Cases 368 (D. Minn., 1947); *Jackson v. Northwest Airlines*, 7 W. H. Cases 702 (D. Minn., 1948); *U. S. Cartridge v. Powell*, no opinion (E. D. Mo., 1947); *Bumpus v. Remington Arms Co.*, 7 W. H. Cases 501 (W. D. Mo.).

Contra: *Barksdale v. Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark.); *Deal & Co. v. Leonard*, 196 S. W. (2d) 991 (S. Ct. Ark.); *Matlock v. Sanderson & Porter*, 6 Wage Hour Rept. 917 (C. C. Ark., Jeff. Co., 1943); *Kruger v. Los Angeles S. & D. Corp.*, 6 W. H. Cases 831 (S. D. Calif.); *Stewart v. Kaiser Co.*, 71 F. Supp. 551 (D. Oregon); *Anderson v. Federal Cartridge Corp.*, 7 W. H. Cases 1 (D. Minn. 1947); *Macklin v. Kaiser Co., Inc.*, 69 F. Supp. 187 (D. Oreg.); *Young v. Kellew Corp.*, 14 Lab. Cas. par. 64, 244 (E. D. Tenn., 1948); *Lynch v. Embury Riddle Co.*, 63 F. Supp. 992 (S. D. Fla.); *Hays v. Hercules Powder Co.*, 7 W. H. Cases 381 (W. D. Mo., 1947); *Treps v. Foley Bros.*, 7 Lab. Cas. par. 61, 743 (W. D. Mo.); *Torres v. Lock Joint Pipe Co.*, 1 Prentice-Hall W & H Serv., par. 10189.8 (D. Puerto Rico).

number of similar cases presently in the course of litigation, we also request the Court to set the case for argument this term.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1948.